No. 12118 Civil

In the United States Court of Appeals for the Ninth Circuit

FRANK W. BABCOCK, APPELLANT

vs.

BEN C. KOEPKE, INDIVIDUALLY, AND AS AREA RENT DIRECTOR, LOS ANGELES DEFENSE-RENTAL AREA, OFFICE OF RENT CONTROL, OFFICE OF THE HOUSING EXPEDITER, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE CENTRAL DIVISION OF THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE

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STATEMENT OF FACTS

This is an appeal from an order of the District Court for the Southern District of California, Central Division, granting a motion by appellee, B. C. Koepke, sued as Ben C. Koepke, to dismiss the complaint of Frank W. Babcock, appellant herein, in an action originally filed by appellant, as plaintiff, in the Superior Court of the State of California for the County of Los Angeles and removed upon petition of appellee-

defendant to the District Court for the Southern District of California.

Appellant, the owner of housing accommodations at 660 W. Jefferson Boulevard, Los Angeles, California (Complaint, Para. 1), brought the action for declaratory relief and an injunction against B. C. Koepke, sued as Ben C. Koepke, Director of the Los Angeles Defense-Rental Area Office of the Office of the Housing Expediter, and the tenants occupying the various units of the housing accommodations at 660 W. Jefferson Boulevard. In this action appellant sought a declaration that the premises were not subject to rent control and an injunction against Koepke restraining him from issuing orders reducing the rents for said housing accommodations (Complaint, Paras. 2, 10 and prayers).

Appellant claimed that the premises were exempt from rent control under the provisions of Section 202 (c) (3) (B) of the Housing and Rent Act of 1947,[1] as amended (50 U. S. C. App. Secs. 1881, et seq.) in that they had not been rented for a successive twenty-four month period between February

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[1] Section 202 (c) (3) (B) provides:

"(c) The term 'controlled housing accommodations' means housing accommodations in any defense-rental area, except that it does not include—

* * * * *

"(3) Any housing accommodations * * * (B) which for any successive twenty-four month period during the period February 1, 1945, to the date of enactment of the Housing and Rent Act of 1948, both dates inclusive, were not rented (other than to members of the immediate family of the landlord) as housing accommodations."

1, 1945 and April 1, 1948 as provided in said subsection.

In support of this claim appellant alleged that the premises had been occupied by Marine Corps personnel from prior to February 1, 1945, to June 1946, that they had remained unoccupied from June to September 1946, and had then been occupied by students of the University of California until August 1947 (Complaint, Pars. 3, 4, and 5). Appellant thereafter accepted surrender of possession from the University and after remodeling and rehabilitating the apartments rented them individually.

As a result of the disagreement between the Office of the Housing Expediter and appellant as to whether the premises were rented as housing accommodations during their occupancy by members of the Marine Corps and students, plaintiff commenced this action. Appellee, Koepke, had advised appellant that he proposed to issue orders fixing maximum rents which would require appellant to refund overcharges to tenants, the other defendants in the action (Petition of B. C. Koepke for removal from the State Court).

Upon the filing of the complaint in the Superior Court of the State of California, in and for the County of Los Angeles, on September 16, 1948, the court granted a temporary restraining order enjoining and restraining Koepke, his agents, servants, and employees from issuing any orders fixing or purporting to fix a maximum rent or rents for the premises at 660 West Jefferson Boulevard and from claiming that the premises were subject to rent control or taking any steps to enforce such a claim

pending disposition of the complaint (Order to show cause and temporary restraining order).

Thereafter on September 21, 1948, B. C. Koepke petitioned for removal of the suit to the District Court of the United States for the Southern District of California, Central Division, showing that this was an action against the United States founded upon an Act of Congress, and a question arising under the Constitution and laws of the United States in which the amount in dispute exceeded $3,000 (Petition of B. C. Koepke, Area Rent Director, on behalf of the United States of America for removal of suit from the State Court).

Pursuant to said petition, the case was removed to the District Court. B. C. Koepke on September 21, 1948, moved to dismiss the cause on the grounds that Tighe E. Woods, the Housing Expediter, was a necessary and indispensable party-defendant, over whom the District Court had no jurisdiction; that B. C. Koepke could not be sued or enjoined unless the Housing Expediter was a party; that the suit was one against the United States which had not consented to be sued and that the complaint failed to state a cause of action upon which relief could be granted (Motion of Ben C. Koepke to dismiss the complaint).

The motion was argued on November 22, 1948, at which time the Court issued orders granting the motion to dismiss, denying the motion for a preliminary injunction, discharging the order to show cause and retaining the temporary restraining order in effect until the signing of the formal order.

On December 7, 1948, the Court made findings of fact and conclusions of law substantially as follows:

FINDINGS OF FACT

1. Apellant owns the premises at 660 West Jefferson Boulevard, Los Angeles, California, within the Los Angeles Defense-Rental Area.

2. Appellee is the Area Rent Director for said Defense-Rental Area.

3. Appellee at all pertinent times was authorized to issue orders fixing maximum rents pursuant to the Controlled Housing Rent Regulation issued September 25, 1948, and for the purpose of issuing such orders is authorized to determine whether housing accommodations are controlled housing accommodations.

4. Defendants, other than Koepke, are tenants of appellant residing in the housing accommodations.

5. On September 2, 1948, appellee by written notices in accordance with appropriate regulations advised appellant that he proposed to issue orders fixing maximum rents for the said housing accommodations.

6. Regulations issued by the Housing Expediter establish an administrative procedure for landlords desiring to secure a review of, or to appeal from orders of appellee fixing maximum rents. This procedure must be presumed adequate.

CONCLUSIONS OF LAW

1. The motion to dismiss should be granted because:

(a) the District Court and the State court from which the case was removed lack jurisdiction to

interfere with administrative proceedings before they have reached the stage of the issuance of orders fixing maximum rents; and

(b) the plaintiff had an adequate remedy at law in that plaintiff may attack any orders fixing maximum rents by administrative and subsequent judicial review or appeal or by way of defense to any action brought pursuant to Sections 205 and 206 of the Housing and Rent Act, as amended, after plaintiff has exhausted his administrative remedies.

2. The plaintiff is not entitled to a preliminary injunction against defendant because:

(a) the District Court and the State court from which the case was removed lack jurisdiction to interfere with the administrative proceedings prior to the issuance of final orders fixing maximum rents;

(b) irreparable injury will not result to the plaintiff by the issuance of such orders since the plaintiff after exhausting his administrative remedies, may set up the invalidity of the orders as a defense; and

(c) no controversy exists of which the Court should take judicial cognizance under the Federal Declaratory Judgment Act (28 U. S. C. 2201, 2202) or otherwise except to deny relief.

3. The Court had jurisdiction of the suit as one arising under the Constitution, treaties or laws of the United States where the matter in controversy exceeds the sum or value of $3,000.

4. Defendant is entitled to recover costs.

The formal order was signed and filed on December 7, 1948, and entered in the Civil Judgment Book

on December 8, 1948. On December 9, 1948, plaintiff appealed from the Order of the District Court dismissing the complaint.

On December 7, 1948, after the Court's order dismissing the complaint but prior to its entry in the Civil Judgment Book, B. C. Koepke issued orders reducing the rents for the various units of the housing accommodations at 660 West Jefferson Boulevard, Los Angeles, California.

Thereafter on December 9, 1948, plaintiff-appellant applied to this Court for an order restraining defendant-appellee for a period of ten days from issuing any orders purporting to fix maximum rents for said premises and such an order was granted as of that date.

On December 14, 1948, appellant moved this Court for an injunction pending appeal, enjoining B. C. Koepke from issuing any orders fixing or purporting to fix maximum rents for the housing accommodations at 660 West Jefferson Boulevard or any part thereof. On December 15, 1948, appellant moved for additional relief consisting of an order to appellee to revoke the maximum rent orders issued by him on December 7, 1948.

The motions were argued on December 20, 1948, and this Court instead of acting thereon, ordered appellant to file a brief on the merits in ten days, the appellee to file a reply brief within ten days thereafter and appellant to file a closing brief ten days after the filing of the reply brief. Appellant has designated the record and filed a statement of points

on appeal. However, appellee has not received any brief on the merits from appellant.

In order that appellee may not be in default this brief has been prepared in opposition to appellant's points on appeal which are as follows:

I

The District Court erred in finding that Appellee was authorized to issue orders fixing maximum rents applicable to the premises at 660 West Jefferson Blvd., Los Angeles, California, and that appellee was authorized in fixing such orders to determine whether the premises were or were not controlled housing accommodations.

This is an appeal from the Court's Finding of Fact No. 3.

II

The District Court erred in finding that the Notices of Proceedings issued by Appellees were authorized by provisions of Section 840.7 of Revised Rent Procedural Regulation No. 1.

This is an appeal from the Court's Finding of Fact, No. 5.

III

The District Court erred in finding that the remedies afforded to appellant by Revised Rent Procedural Regulation No. 1 were adequate.

This is an appeal from the Court's Finding of Fact No. 6.

IV

The District Court erred in holding that neither it nor the Court from which the cause was removed had jurisdiction to interfere with the administrative proceedings conducted by Appellee.

This is an appeal from the Court's Conclusion of Law No. 1 (a).

V

The District Court erred in holding that the Appellant had an adequate remedy at law.

This is an appeal from the Court's Conclusion of Law No. 1 (b).

VI

The District Court erred in denying a preliminary injunction against the appellee.

This is an appeal from the Court's Conclusion of Law No. 2.

VII

The District Court erred in concluding that irreparable injury did not result to appellant by the issuance of the proposed orders of the Appellee.

This is an appeal from the Court's Conclusion of Law No. 2 (b).

VIII

The District Court erred in concluding that no controversy capable of judicial cognizance existed between Appellant and Appellee.

This is an appeal from the Court's Conclusion of Law No. 2 (c).

IX

The District Court erred in denying Appellant's Motion for Preliminary Injunction and in dissolving the temporary restraining order theretofore issued.

This is apparently an enlargement of Point VI.

X

The District Court erred in dismissing Appellant's Complaint as to Appellee.

This is apparently a general exception to Conclusion of Law No. 1.

ARGUMENT

I

The district court was correct in holding that appellee was authorized to issue orders fixing maximum rents applicable to the premises at 660 West Jefferson Boulevard, Los Angeles, California, and that appellee was authorized in fixing such orders to determine whether the premises were or were not controlled housing accommodations.

The district court found that appellee had authority to issue orders fixing maximum rents applicable to 660 West Jefferson Boulevard under the provisions of Section 825.5 of the Controlled Housing Rent Regulations issued September 25, 1948 (13 F. R. 5706) (Code of Federal Regulations, Part 825—Rent Regulations Under the Housing and Rent Act of 1947, as amended).[2] The finding of the district court is clearly correct.

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[2] Applicable portions of this regulation are printed in the Appendix, pp. 32–35.

Appellant has not attacked the validity of the Regulation and could not do so successfully. Section 825.4 of the Regulation provides for registration of controlled housing accommodations and for establishment of maximum rents under Section 825.5 on failure to register. The Housing Expediter has delegated to appellee the authority to make the initial determination as to proper rents for controlled housing accommodations in the Los Angeles Defense-Rental Area. As a necessary corollary appellee has the authority and obligation to apply the statute and regulation to particular situations and thereby to determine at least preliminarily whether or not particular housing accommodations have been decontrolled. Until appellant has exhausted the administrative remedies provided in the statutes and applicable regulations, courts will not interfere with appellee's determination.

This has been established by several decisions of the Supreme Court, particularly *Myers* v. *Bethlehem Shipbuilding Corporation,* 303 U. S. 41 at page 50 in which Bethlehem contended that it was not engaged in interstate commerce and was therefore entitled to enjoin the National Labor Relations Board from conducting a hearing as to its labor practices. The Court said:

> The Corporation contends that, since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the District Court has jurisdiction to

> enjoin the holding of a hearing by the Board. So to hold would, as the Government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.

In *Macauley, Acting Chairman of the United States Maritime Commission* v. *Waterman Steamship Corp.*, 327 U. S. 540 at page 544, the Supreme Court followed the ruling in the *Myers* case, stating:

> Just as in the *Myers* case, the claim here is that the contracts are not covered by the applicable statute. And the applicable statute, the Renegotiation Act, like the National Labor Relations Act in the *Myers* case, empowers administrative bodies to rule on the question of coverage. The Renegotiation Act authorizes the Chairman of the Maritime Commission to conduct investigations in the first instance to determine whether excessive profits had been made on contracts with the Commission.

The district court was therefore correct in holding that appellee was authorized to determine whether the premises were controlled housing accommodations.

II

The district court was correct in finding that the Notices of Proceedings issued by Appellee were authorized by Section 840.7 of Revised Rent Procedural Regulation No. 1.[3]

Section 840.7 of Revised Rent Procedural Regulation No. 1 (13 F. R. 2369) reads as follows:

> § 840.7 *Action by the Area Rent Director on his own initiative.* In any case where the Area Rent Director pursuant to the provisions of a maximum rent regulation, deems it necessary or appropriate to enter an order on his own initiative, he shall, before taking such action, serve a notice upon the landlord of the housing accommodations involved stating the proposed action and the grounds therefor. The proceeding shall be deemed commenced on the date of issuance of such notice.

As stated under I above appellee was authorized to determine whether the housing accommodations were subject to rent control. Appellee's actions complied in all respects with the section quoted. Paragraph 12 of the complaint alleges that defendant mailed to plaintiff notice of his intention to issue orders fixing maximum rents for the apartments.

The district court accordingly was fully justified in finding that the Notices of Proceedings were authorized by Section 840.7 of the Revised Rent Procedural Regulation.

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[3] Applicable portions of this regulation are printed in the Appendix, pp. 35–39.

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III and V

The district court was correct in finding that the remedies afforded to appellant by Revised Rent Procedural Regulation No. 1 were adequate and that he had an adequate remedy at law.

The district court found as a fact (Finding of Fact No. 6) that the Housing Expediter had established an administrative procedure for landlords who desire to secure a review of, or to take an appeal from, orders of an Area Rent Director fixing maximum rents and that, at this stage of the proceedings, the remedy afforded must be presumed to be adequate. The Court found as a matter of law that appellee had an adequate remedy at law. The review and appeal sections referred to by the Court are set out in full in the excerpt from the Revised Rent Procedural Regulation 1 attached hereto. The pertinent sections are *Subpart A, Landlord's Application for Review of Area Rent Director's Action,* Sections 840.11–840.13, inclusive; *Subpart B, Appeals to the Housing Expediter—General Provisions,* Sections 840.14–840.34, inclusive.

These sections provide for review by the Regional Housing Expediter of the appropriate region and for appeal to the Housing Expediter. Appellant contends that, because he must deposit the money he has been ordered to refund in the United States Treasury if he wishes his appeal to operate as a stay, the appeal provisions do not afford him an adequate remedy at law. It is true that the appellant in this case is required to deposit a considerable amount of

money. It is also true that if appellee is correct, he has had the use of that money at the expense of his tenants.

The Supreme Court rejected a similar argument in the *Waterman* case, *supra,* when it said (327 U. S. at p. 545):

> Respondent urges several grounds for not applying the rule of the *Myers* case here. It points out that wilful failure to comply with the Adjustment Board's request for information would subject it to penalties under the Act; that the Chairman of the Commission and the Tax Court can enforce their orders without court enforcement proceedings; that the Act specifically provides that the Tax Court's determination is not subject to court review; and that, even if respondent could, subsequent to a Tax Court determination, have resort to the courts, it would be subjected to a multiplicity of suits in order to recover the money due on the contracts. Even if one or all of these things might possibly occur in the future, that possibility does not affect the application of the rule requiring exhaustion of administrative remedies. The District Court had no power to determine in this proceeding and at this time issues that might arise because of these future contingencies. Its judgment dismissing the complaint was correct. The judgment of the Circuit Court of Appeals is reversed.

See also in this connection, *Petroleum Co.* v. *Commission,* 304 U. S. 209, 218; *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113, 125; *Myers* v. *Bethlehem Ship-building Corp.,* 303 U. S. 41.

Anderson v. Schwellenbach, 70 F. Supp. 14 (N.D. Cal.) Three-judge Court, Judges Healy, Roche and Harris

In *Gates* v. *Woods,* 169 F. 2d 440 (C. C. A. 4th), Gates sought to enjoin the Housing Expediter from enforcing the Rent Regulations under the Housing and Rent Act of 1947, as amended and the district court dismissed the suit. On appeal, this action was affirmed, Judge Dobie, speaking for the Court said:

> The rule is well settled that a person must first exhaust the prescribed administrative remedy before he can seek any relief in the courts. As our present Chief Justice (then sitting in the United States Court of Appeals for the District of Columbia) said in *Black River Valley Broadcasters, Inc.* v. *McNinch,* 101 F. 2d 235, at p. 238:
>
> "It has long been the established rule that proceedings in equity for an injunction cannot be maintained where the complaining party has a plain, adequate, and complete remedy at law for the right sued upon. * * * In general, where there is an administrative remedy provided by statute, it has been declared to be a plain, adequate, and complete remedy, barring injunctive relief."
>
> * * * * *
>
> The plaintiffs have not even attempted to avail themselves of these administrative remedies. They argue that the rent director has exceeded his jurisdiction and that a full investigation would have disclosed that the property in question was decontrolled. The plaintiffs, however, did nothing to bring the facts concerning the property to the attention of the rent director; rather they rushed into the State Court and sought an injunction to checkmate the Housing Expediter and his subordinates

> from carrying out the duties imposed upon them by the Act. To sanction such procedure on their part would cut the heart out of administrative action and lead to chaos in the courts. The rule as to the exhaustion of administrative remedies applies just as forcibly when, as here, the contention is made that the administrative agency lacked jurisdiction over the subject matter. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51, and cases there cited.

In *Smith* v. *Duldner, Cleveland Area Rent Director,* (Civil No. 25308), Judge Jones in the District Court for the Northern District of Ohio, Eastern Division issued a temporary order enjoining enforcement of an order of the Area Rent Director reducing rents on housing accommodations operated by plaintiff on the ground that the Housing and Rent Act of 1947 was unconstitutional. After its constitutionality had been established, Judge Jones dissolved the restraining order and dismissed the complaint, stating "A proceeding in equity cannot be maintained where the party seeking the injunction has an adequate remedy at law. Rent Procedural Regulation No. 1 issued by the Housing Expediter, a copy of which is attached to defendant's brief, provides for review and appeal of the orders of Area Rent Directors and therefore offers plaintiff a remedy at law which must at this stage be presumed to be adequate." (See attached copy of Memorandum on Defendant's Motion to Dissolve Restraining Order and to Dismiss.)

Moreover, as the Court below pointed out, in addition to the administrative remedies, appellant has a

further remedy since, if appellant's contention is correct and the accommodations are not subject to control, he will have an adequate defense to any suit for refund brought by a tenant after he has exhausted his administrative remedies.

In the light of the foregoing it is evident that appellant is afforded an adequate remedy at law.

IV

The district court was correct in holding that neither it nor the Court from which the cause was removed had jurisdiction to interfere with the administrative proceedings conducted by appellee.

As a conclusion of law based on the Findings of Fact the district court determined that it lacked jurisdiction to interfere with the administrative proceedings of appellee until they had reached a stage of coercive finality by the issuance of orders, and that appellant had an adequate remedy at law in that he may obtain administrative review and subsequent judicial review and may assert decontrol as a defense to suits after the exhaustion of his administrative remedies. The district court also concluded that the court from which the cause was removed had no jurisdiction.

The arguments already presented have established that appellant may not invoke the jurisdiction of a district court to interfere with properly constituted administrative procedures. (Points I and III, *supra,* p. 13 and p. 10.) This is merely another way of stating that district courts have no jurisdiction over administrative procedures until the exhaustion of adminis-

trative remedies. Consequently the only new matter raised in this point is the jurisdiction of the state court from which the case was removed.

It is clear that if the case was properly removed the jurisdiction of the state court terminated, since under Section 1446 (e) of the Judicial Code (Title 28 U. S. C. 1446), once the removal is effected the State court "shall proceed no further."

Any civil action commenced in a State court against any officer of the United States for any act performed under color of such office may be removed to a district court (28 U. S. C. 1442). This is such an action. In addition, it arises under the laws of the United States, namely the Housing and Rent Act of 1947, as amended (50 U. S. C. App. 1881, et seq.), and the amount in controversy exceeds $3,000 and is therefore removable under 28 U. S. C. 1331 and 1441 (b). Clearly then the case was properly removed and the State court was obliged to relinquish any jurisdiction it may have originally acquired. The conclusion of the district court as to lack of jurisdiction, is obviously correct.

See *Gates* v. *Woods, supra,* for a similar state of facts.

VI and IX

The dictrict court was correct in denying a preliminary injunction against appellee and in dissolving the temporary restraining order theretofore issued.

As was pointed out in *Gates* v. *Woods, supra,* to permit interference by courts in the administrative proceedings of governmental agencies would result

in chaos. Nor is it to be assumed that such agencies will not act properly. *Yakus* v. *United States,* 321 U. S. 414, 435, 439; *Bradley* v. *City of Richmond,* 227 U. S. 477, 485; *Lockerty* v. *Phillipps,* 319 U. S. 182, 186.

In any event this suit was premature because no order had been entered at the time when suit was instituted. As the Court below found the appellant was not entitled to a preliminary injunction because

> (a) This Court has no jurisdiction and neither has the court from which the cause was removed jurisdiction to interfere by injunctive process with the administrative proceedings now pending before defendant Ben C. Koepke concerning the premises at 660 West Jefferson Boulevard, Los Angeles, California, designated as Docket No. 271860 prior to the time that any proposed action has become final and coercive by the issuance of orders fixing maximum rents.

Moreover, there was substantial basis for denial of preliminary injunctive relief here. The Housing Expediter has heretofore promulgated an interpretation of the Rent Regulation under the Housing and Rent Act of 1947, as amended,[4] which supports the proposed action of appellee. The United States District Court for the Western District of Minnesota, 4th Division, in *Woods* v. *Halverson,* (Civil No. 2701), has approved the Expediter's interpretation. A copy of the opinion of Judge Nordbye in that case is attached hereto.

Under such circumstances the Court below in the sound exercise of its discretion was justified in refus-

[4] See Appendix, p. 34 for text of the interpretation.

ing to issue a preliminary injunction and this Court should not reverse its decision.

See *Hannan* v. *City of Haverhill,* 120 F. 2d 87 (C. C. A. 1st) in which the Court reviews the authorities on this point and quotes with approval the following from *New York Asbestos Manufacturing Co.* v. *Ambler Asbestos Air-Cell Covering Co.,* 102 F. 890, 891 (C. C. A. 3rd).

> The granting of a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it; and the decision of a court of first instance, refusing such an injunction, will not, except for very strong reasons, be reversed by this court.

See also *Bankers Utilities Co., Inc., et al.* v. *National Bank Supply Co., Inc., et al.,* 53 F. 2d 432 (C. C. A. 9th), a decision of this Court to the same effect.

Clearly there was no such manifest abuse of discretion as to warrant reversal of the judgment below.

The temporary restraining order was originally issued by the State court. It expired by its own terms when the district court disposed of the motion for a preliminary injunction. *Schainmann* v. *Brainard,* 8 F. 2d 11 (C. C. A. 9th). There was accordingly no necessity for the district court to take any action concerning it.

VII

The District Court was correct in concluding that no irreparable injury resulted to appellant by issuance of the proposed orders.

It has already been established that appellant has an adequate remedy at law. If his remedy is adequate, obviously there will be no injury which that remedy will not repair. If the Area Rent Director's orders are sustained, there will be no injury to appellant. If his appeal is allowed, the orders will be revoked *ab initio*. The invalidity of the orders will be a defense in any tenants' suits which may be brought after administrative determination of the status of the properties.

The case of *Myers* v. *Bethlehem Shipbuilding Corporation, supra,* disposed of the contention that the requirement that a party submit to administrative proceedings to establish its rights would result in irreparable injury. See that portion of the opinion quoted at page 11 of this brief. A claim of irreparable injury will not be recognized where valid administrative procedures have been established. The District Court's holding was, therefore, correct.

VIII and X

1. The District Court was correct in concluding that no controversy capable of judicial cognizance existed between appellant and appellee and, therefore, was right in dismissing the complaint as to appellee

Although the Court below did not cite any specific facts for the above conclusions, appellee in its motion to dismiss had maintained that the action should be dismissed because the controversy was actually between appellant and the Housing Expediter, who was neither sued nor served. If this Court finds that the Housing Expediter is an indispensable party, it should

sustain the conclusions of the Court below, even though that Court did not in fact base its conclusions on such grounds.

Appellee contends that the Housing Expediter is an indispensable party who is not within the jurisdiction of the Court. Primarily, it should be noted that all powers under the Housing and Rent Act of 1947, as amended, are vested in the Housing Expediter by express provisions of Section 204 (a) of the Act. And by Section 204 (d), the Expediter is authorized to issue such regulations and orders as he may deem necessary to carry out the provisions of such section and Section 202 (c). It is the last numbered section which states the requirements to be fulfilled in order for housing accommodations to be exempt from control because they have not been rented for twenty-four successive months.

Pursuant to express authority thus conferred by Section 204 (d), the Housing Expediter issued the Controlled Housing Rent Regulation, hereafter referred to as the "Housing Regulation." By paragraph (b) (2) (iii) of Section 825.1 of such Regulation, as amended, the following housing accommodations, inter alia, are exempt from rent control:

> (iii) *Accommodations not rented for two-year period.* Housing accommodations which for any successive 24-month period during the period February 1, 1945 to March 30, 1948, both dates inclusive, were not rented (other than to members of the immediate family of the landlord) as housing accommodations.

The foregoing exemption is identical with that set out in Section 202 (c) (3) (B) of the Act, as amended.

The Housing Expediter has issued an interpretation which requires the appellee to regard the housing accommodations at 660 West Jefferson Boulevard as controlled housing accommodations (*supra,* p. 20). In instituting the proceedings complained of, appellee is only carrying out the order of the superior official in whom all powers under the Housing and Rent Act, as amended, are expressly vested under Section 204 (a).

In these circumstances, the Housing Expediter is an indispensable party and, therefore, this suit must be dismissed unless he has been sued in the right court and has been properly made a party. *Williams* v. *Fanning,* 332 U. S. 490; *Gnerich* v. *Rutter,* 265 U. S. 388; *Webster* v. *Fall,* 266 U. S. 507; *Warner Valley Stock Company* v. *Smith,* 165 U. S. 28; *Alcohol Warehouse Corporation v. Canfield,* 11 F. 2d 214 (C. C. A. 2d); *National Conference on Legalizing Lotteries* v. *Goldman,* 85 F. 2d 66 (C. C. A. 2d); *Jewel Production* v. *Morgenthau, Secretary of the Treasury,* 11 F. 390 (C. C. A. 2d); *Neher* v. *Harwood,* 128 F. 2d 846 (C. C. A. 9th); *Eighth Regional War Labor Board* v. *Humble Oil and Refining Company,* 145 F. 2d 462 (C. C. A. 5th).

In *Williams* v. *Fanning, supra,* the Postmaster General, after a hearing in Washington, D. C., found that petitioners' weight-reducing enterprise was fraudulent. He accordingly issued a fraud order directing the respondent, as postmaster at Los

Angeles, where petitioners do business, to refuse payment of any money order drawn to the order of petitioners, to advise the remitter of such money order that payment had been forbidden, and to stamp "fraudulent" on all matter directed to petitioners, and to return it to the senders. Petitioners sued the local postmaster to enjoin him from carrying out the order. Motion to dismiss was made on the ground that the Postmaster General was an indispensable party, and granted by the lower courts. The Supreme Court reversed, and held that the motion to dismiss should be overruled. Speaking of *Gnerich* v. *Rutter, supra,* and related cases, the Court said (p. 493):

> These cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require *him* to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him. [Italics added.]

The Court then compared the facts and principles in those cases with the facts and principle laid down in *Colorado* v. *Toll,* 268 U. S. 228, and at the same time, stressed the fact that there was no conflict between these two lines of cases, since the *Toll* case involved a situation where "relief against the offending officer could be granted without risk that the judgment awarded would 'expend itself on the public treasury or domain, or *interfere* with the *public administration.*' *Land* v. *Dollar,* 330 U. S. 731, 738" [Italics added].

The Supreme Court went on to say that the decree in the case before it was like the decree in the *Toll* case, since it will "effectively grant the relief desired by expending itself on the subordinate official who is before the Court." The Court declared that it was the local postmaster *alone* "Who refuses to pay money orders, who places the stamp 'fraudulent' on the mail, who returns the mail to the senders." Thus, as the Court further pointed out, if the local postmaster "desists in those acts, the matter is at an end. That is all the relief which petitioners seek." Comparing the case before it and the facts in the *Rutter* and related cases, the Court concluded as follows (p. 494):

> The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as in the *Rutter* case. *No concurrence on his part is necessary* to make lawful the payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command. [Italics added.]

When these principles are applied to the facts in the instant case, it becomes clear that the *Rutter* and related cases should control, rather than the *Toll* case.

As was pointed out above, the Housing and Rent Act of 1947 not only vests all powers, functions, and duties in the Expediter, but also the power to make such adjustments in such maximum rents as may be necessary to correct inequities, or further carry out

the purposes and provisions of this title. The Expediter alone is further authorized and directed to remove any maximum rents in any defense-rental area if, in his judgment, the need for continuing them no longer exists.

Hence, in this case, unlike the *Fanning* case, we do not have a situation where relief can be granted against the subordinate employee named as a defendant without risk that the judgment would interfere with public administration of an Act designed to prevent runaway rent increases. The decree here requested, unlike the one in the *Fanning* case, would restrain this appellee from taking action with respect to this appellant, which has already been held proper with respect to a landlord similarly situated in the *Halverson* case, *supra.* Clearly, its effect is to require the Housing Expediter to take action to reconcile the two situations. It thus falls squarely within the line of cases cited in *Williams* v. *Fanning* at page 493, where "the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him."

This was the reasoning applied in *Whitehall* v. *Turchi* (E. D. Pa.), No. 8078, decided March 24, 1948, not reported, a case squarely in point (copy of opinion attached hereto) where the court said:

> There is no doubt that if the Regulation is held invalid and the ruling sustained by the appellate courts, the administration of the Act throughout the entire country will be affected

and hence it cannot be said that the judgment awarded would not "interfere with the public administration." *Land* v. *Dollar,* 330 U. S. 731, 738. As a matter of fact, in that event the Regulation would have to be rescinded or changed. Otherwise, the Housing Expediter would be in the position of directing and requiring his subordinates, by a general regulation, to act contrary to the law. Therefore, "the decree granting the relief sought will" not only interfere with the public administration but will "require him (the defendant's superior) to take action." *Williams* v. *Fanning,* U. S. Supreme Court, decided December 8, 1947. Although such a decree would not in terms order him to do so, the matter is one of substance, and if the ultimate result of the decree would be to compel action by the superior, the superior is an indispensable party.

One of the cases referred to by the Supreme Court as evolving the principle upon which it rested its decision in *Williams* v. *Fanning, supra,* was *Gnerich* v. *Rutter,* 265 U. S. 388, and what was said in the opinion in that case can be paraphrased to fit the present case, "The act and the regulations make it plain that the (local Rent Directors) are mere agents and subordinates of the (Housing Expediter). They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been

made a party defendant—the principal one—and given opportunity to defend his direction and regulations."

2. The action must be dismissed because it in effect is a suit against the United States which has not consented thereto

The action must be dismissed as a suit against the United States which cannot be sued without its consent. "No principle is better established than that the United States may not be sued in the courts of this country without its consent * * *. That the United States is not named in the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can be rendered." *Louisiana* v. *McAdoo,* 234 U. S. 627, 628, 629. See also, *Transcontinental & Western Airlines* v. *Farley,* 71 F. 2d 288, 290 (C. C. A. 2d), certiorari denied, 293 U. S. 603.

Any judgment or decree which can be rendered in this case will plainly affect the rights of the United States. The grave need for the continuation of rent control was made clear by Congress in its declaration of policy under Section 201 (b) of the Housing and Rent Act of 1947, when it declared that it "recognizes that an emergency exists and that, for the prevention of inflation and for the achievement of a reasonable stability in the general level of rents during the transition period, as well as the attainment of other salutary objectives of the above-named Act, it is necessary for a limited time to impose certain restrictions upon

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rents charged for rental housing accommodations in defense-rental areas." With this vital public welfare at stake, it is plain that the Government is the real party in interest and the attempt made here to prevent Government officials from discharging their statutory responsibilities is in reality a suit against the United States.

This conclusion is thoroughly supported by controlling decisions of the Supreme Court and lower courts. (*Naganab* v. *Hitchcock,* 202 U. S. 473; *Wells* v. *Roper,* 246 U. S. 335; *United States* v. *Griffin,* 303 U. S. 226; *Mine Safety Appliance Company* v. *Forrestal,* 326 U. S. 371.[5]

Even though the action in this case is against officers or agents of the United States, it is not one to enjoin individual action contrary to law, but rather a suit to restrain an officer of the Government in performance of his official duties and, therefore, it is an action against the United States. Such an action will not lie unless the United States has consented to be sued. Since the United States has not consented to be sued in this type of proceeding, and since it is an indis-

[5] Suit to restrain Secretary of the Interior from carrying out the provisions of Act of June 27, 1902, c. 1157, 32 Stat. 400, controlling the disposition of pine lands ceded by the Indians is, in effect, a suit against the United States. *Naganab* v. *Hitchcock*, *supra.*

Suit to enjoin Postmaster General from annulling contract for collecting and delivering mail in Washington, deemed one against the United States. *Wells* v. *Roper*, *supra.*

Suit to set aside an order of Interstate Commerce Commission concerning railway mail pay is not primarily one against the Commission, but is primarily against the United States. *United States* v. *Griffin*, *supra.*

pensable party to this case, this action against the Government officers must be dismissed. *Louisiana* v. *McAdoo, supra; Wells* v. *Roper, supra; Naganab* v. *Hitchcock, supra; Bryan* v. *United States,* 99 F. 2d 549 (C. C. A. 10th), certiorari denied, 305 U. S. 661; *Noce* v. *Edward C. Morgan Company,* 106 F. 2d 746 (C. C. A. 8th); *Wilson* v. *Wilson,* 141 F. 2d 599 (C. C. A. 4th); *International Trading* v. *Edison,* 109 F. 2d 825 (App. D. C.), certiorari denied, 310 U. S. 652; *Haskins Bros. & Company* v. *Morgenthau, Secretary of Treasury, et al.,* 85 F. 2d 677 (App. D. C.); *Krug* v. *Fox,* 161 F. 2d 1013 (C. C. A. 4th); *Howard* v. *United States,* 126 F. 2d 667, 668 (C. C. A. 10th), certiorari denied, 62 S. Ct. 1297; *Ainsworth* v. *Barn Ball Room,* 157 F. 2d 97 (C. C. A. 4th).

CONCLUSION

It is therefore respectfully submitted that the action of the District Court in dismissing the complaint and denying a preliminary injunction is correct, and the judgment should be affirmed.

Respectfully submitted,

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APPENDIX

Controlled Housing Rent Regulation
(13 F. R. 5706)

§ 825.4 *Maximum rents*—(a) *Maximum rents in effect on June 30, 1947.*—The maximum rent for any housing accommodation under §§ 825.1 to 825.12, inclusive (unless and until changed by the Expediter as provided in § 825.5), shall be the maximum rent which was in effect on June 30, 1947, as established under the Emergency Price Control Act of 1942, as amended, and the applicable rent regulation issued thereunder, except as otherwise provided in this section. * * *

(c) * * *.

* * * * *

If the landlord fails to file a proper registration statement within the time specified, the rent received for any rental period commencing on or after the date of the first renting shall be received, subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under § 825.5 (c) (1) or (6). Such amount shall be refunded to the tenant within 30 days after the date of the issuance of the order unless the refund is stayed in accordance with the provisions of Revised Rent Procedural Regulation 1 (Part 840 of this chapter). If the Expediter finds that the landlord was not at fault in failing to file a proper registration statement within the time specified the order under § 825.5 (c) may relieve the landlord of the duty to refund. The landlord shall have the duty to refund only if the order under § 825.5

(c) is issued in a proceeding commenced by the Expediter within 3 months after the date of filing of such registration statement.

* * * * *

§ 825.5 *Adjustments and other determinations.*—This section sets forth specific standards for the adjustment of maximum rents. In applying these standards and entering orders increasing or decreasing maximum rents, the Expediter shall give full consideration to the correction of inequities in maximum rents and the purposes and provisions of the Housing and Rent Act of 1947, as amended.

In the circumstances enumerated in this section, the Expediter may issue an order changing the maximum rents otherwise allowable or the minimum space, services, furniture, furnishings or equipment required, except in cases where an order increasing or decreasing the maximum rent on the same facts and grounds was entered under the rent regulations issued pursuant to the Emergency Price Control Act of 1942, as amended.

* * * * *

(c) *Grounds for decrease of maximum rent.*—The Expediter at any time, on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable only on the grounds that:

(1) *Rent higher than rents generally prevailing.*—The maximum rent for housing accommodations established under paragraph (c), (d), (e), (g), or (j) of section 4 of the Rent Regulation for Housing, issued pursuant to the Emergency Price Control Act of 1942, as amended, or under § 825.4 (c) or (e) is higher than the rent generally prevailing in the defense-rental area for comparable housing accommodations on the maximum rent date.

Where the maximum rent for said housing accommodations was originally established under paragraph (c), (d), (e), or (j) of section 4 of the Rent Regulation for Housing, issued pursuant to the Emer-

gency Price Control Act of 1942, as amended, and the landlord failed, due to his fault, to file a timely proper registration statement, the rent received for any rental period commencing on or after July 1, 1947 shall be received subject to refund to the tenant of any amount in excess of the maximum rent which may later be fixed by an order under this section. Such amount shall be refunded to the tenant within 30 days after the date of the issuance of the order, unless the refund is stayed in accordance with the provisions of Revised Rent Procedural Regulation 1 (Part 840 of this chapter). The landlord shall have the duty to refund only if the order under this section is issued in a proceeding commenced by the Expediter within 3 months after the date of filing of such registration statement.

* * * * *

APPENDIX—INTERPRETATIONS

LEASES MADE UNDER SECTION 204 (B) OF THE HOUSING AND RENT ACT OF 1947, AS AMENDED

* * * * *

DECONTROL OF CERTAIN CLASSES OF HOUSING ACCOMMODATIONS

* * * * *

VI. *Housing accommodations not rented for any successive twenty-four-month period between February 1, 1945, and March 30, 1948.*

* * * * *

9. *Housing accommodations which were exempt from rent control during two-year period.*—Where during the two-year period housing accommodations were rented under circumstances which caused the renting to be exempt from the rent regulations, the mere fact that such an exemption existed does not result in decontrol.

* * * * *

Another example of the same principle is the following: A college dormitory was occupied by students during the two-year period under circumstances

which made rooms exempt from rent control. After the two-year period, the college proposes to rent the rooms in the structure to professors or other persons on an ordinary landlord-tenant basis. Such a renting would be subject to rent control because, although the rooms in the dormitory were exempt during the two-year period, they were in fact rented to persons other than members of the landlord's immediate family.

Revised Rent Procedural Regulation No. 1 (13 F. R. 2369)

Subpart A—Landlords' Petition; and Tenants Applications

§ 840.7 *Action by the Area Rent Director on his own initiative.*—In any case where the Area Rent Director pursuant to the provisions of a maximum rent regulation, deems it necessary or appropriate to enter an order on his own initiative, he shall, before taking such action, serve a notice upon the landlord of the housing accommodations involved stating the proposed action and the grounds therefor. The proceeding shall be deemed commenced on the date of issuance of such notice.

Landlord's Application for Review of Area Rent Director's Action

§ 840.11 *Landlord's application for review.*—(a) Any landlord, except a landlord subject to an order issued pursuant to § 840.8 (c), whose petition for adjustment or other relief has been dismissed or denied in whole or in part by the Area Rent Director, or any landlord subject to an order entered by the Area Rent Director on his own initiative, may file with the Area Rent Director an application for review of such determination by the Regional Housing Expediter for the region in which the defense-rental area office is located: *Provided,* That any landlord subject to an order entered under section 5 (d) of any maximum rent regulation or subject to an order entered

by the Area Rent Director under § 840.7, may either apply for review of such order as provided in this section, or may appeal any provision of such order as provided in § 840.14 and following of this part. An application for review shall be filed in triplicate upon forms prescribed by the Housing Expediter and pursuant to instructions stated on such forms. Upon the filing of an application for review or appeal with respect to such determination, the Area Rent Director shall forward the record of the proceedings, with respect to which such application for review is filed, to the appropriate Regional Housing Expediter, or, in the case of an appeal, to the Housing Expediter: *Provided, however,* That the Area Rent Director, within fifteen days after the filing of such application for review or appeal, may grant the relief requested therein, in whole or in part, by revoking or modifying his order upon reconsideration, without notice, except where such order has the effect of requiring the landlord to make a refund to the tenant pursuant to the rent regulations and the landlord has obtained a stay of his obligation to refund in accordance with the provisions of this part.

Within ten days after date of issuance of an order upon reconsideration by the Area Rent Director, the landlord shall file in the Area Rent Office a written statement electing either to withdraw or to continue in effect the pending application for review or appeal. If such statement is not filed within the time provided the application for review or appeal shall be dismissed.

(b) Applications for review may be filed within sixty (60) days after the date of issuance of the determination to be reviewed. An application for review which is not filed within the specified time ordinarily will be dismissed unless special circumstances are shown to justify a later filing.

(c) Where the effect of an Area Rent Director's order is to require a landlord to make a refund to the tenant in accordance with the provisions of section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation, section 5 (b) (2) of the

Rent Regulation for Controlled Rooms in Rooming Houses and other Establishments, section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for New York City Defense-Rental Area, section 5 (b) (2) of the Rent Regulation for Controlled Rooms in Rooming Houses and Other Establishments in New York City Defense-Rental Area, section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for Miami Defense-Rental Area, section 5 (b) (2) of the rent regulation for Controlled Rooms in Rooming Houses and Other Establishments in Miami Defense-Rental Area, or section 4 (c), 4 (e), (5) (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for Atlantic County Defense-Rental Area, the obligation to refund shall be stayed if the landlord, within thirty (30) days after the date of issuance of said order, duly files an application for review together with a refund transmittal memorandum directed to the Regional Budget and Finance Officer on forms prescribed by the Housing Expediter, accompanied by a certified check or money order in the amount of the refund payable to the U. S. Treasurer, and such additional information and documents as may be required. The money so deposited shall be distributed pursuant to the order of the Regional Housing Expediter or in accordance with the final disposition of the proceedings.

§ 840.12 *Action on application for review.*—Upon the filing of an application for review in accordance with § 840.11 and after due consideration the Regional Housing Expediter may, by appropriate order, affirm, revoke, or modify, in whole or in part, the determination of the Area Rent Director sought to be reviewed, or, if considered necessary or appropriate, may remand the proceedings to the Area Rent Director for further action not inconsistent with the determination of the Regional Housing Expediter. In any case where an application for review does not conform in a substantial respect to the requirements of this part, the Regional Housing Expediter may dismiss such

application. An order entered by a Regional Housing Expediter upon an application for review shall be effective and binding until changed by further order and shall be final subject only to appeal as provided in § 840.14 and following of this part. An order entered by a Regional Housing Expediter upon an application for review may be revoked or modified at any time, *Provided, however,* Due notice of the intention so to revoke or modify was previously given to the applicant.

If the effect of the order of the Area Rent Director is to require a refund of rent to the tenant under section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation, section 5 (b) (2) of the Rent Regulation for Controlled Rooms in Rooming Houses and Other Establishments, section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for New York City Defense-Rental Area, section 5 (b) (2) of the Rent Regulation for Controlled Rooms in Rooming Houses and Other Establishments in New York City Defense-Rental Area, section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for Miami Defense-Rental Area, section 5 (b) (2) of the rent regulation for Controlled Rooms in Rooming Houses and Other Establishments in Miami Defense-Rental Area, or section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for Atlantic County Defense-Rental Area, the modification or revocation of said order by the Regional Housing Expediter or by the Area Rent Director upon remand, as it affects the refund, shall be retroactive if a stay has been obtained pursuant to § 840.11.

§ 840.13 *Receipt of oral testimony.*—(a) In most cases, evidence in application for review proceedings will be received only in written form. This procedure is most conducive to the fair and expeditious disposition of such proceedings. However, the person filing an application for review may request the receipt of oral testimony. Such request shall be accompanied by a showing as to why the filing of affidavits or

other written evidence will not permit the fair and expeditious disposition of the application.

(b) In the event that the Regional Housing Expediter orders the receipt of oral testimony, notice shall be served on the person filing the application, not less than five (5) days prior to the receipt of such testimony, which notice shall state the time and place of the hearing and the name of the presiding officer designated by the Regional Housing Expediter.

(c) A stenographic report of any hearing of oral testimony shall be made, a copy of which shall be available during business hours in the appropriate Regional or Area Office.

SUBPART B—APPEALS TO THE HOUSING EXPEDITER

Introduction.—Subpart B deals with "appeals" to the Housing Expediter. An appeal is the means provided for landlords to make formal objections to a maximum rent regulation or order.

The filing and determination of a proper appeal is ordinarily a prerequisite to obtaining judicial review of administrative determinations. At any time during the administrative consideration of an appeal directed solely to a regulation, the Housing Expediter may refer the appeal to the Area Rent Director for the area from which the appeal arises and request such Area Rent Director to make recommendation with respect to the disposition of the appeal.

HOUSING AND RENT ACT OF 1947, AS AMENDED (50 U. S. C. A. SECS. 1881, ET SEQ.)

SEC. 201. (b) The Congress therefore declares that it is its purpose to terminate at the earliest practicable date all Federal restrictions on rents on housing accommodations. At the same time the Congress recognizes that an emergency exists and that, for the prevention of inflation and for the achievement of a reasonable stability in the general level of rents during the transition period, as well as the attain-

ment of other salutary objectives of the above-named Act, it is necessary for a limited time to impose certain restrictions upon rents charged for rental housing accommodations in defense-rental areas. Such restrictions should be administered with a view to prompt adjustments where owners of rental housing accommodations are suffering hardships because of the inadequacies of the maximum rents applicable to their housing accommodations, and under procedures designed to minimize delay in the granting of necessary adjustments, which, so far as practicable, shall be made by local boards with a minimum of control by any central agency.

SEC. 202. As used in this title— * * *

(c) The term "controlled housing accommodations" means housing accommodations in any defense-rental area, except that it does not include— * * *

(3) any housing accommodations * * * (B) which for any successive twenty-four month period during the period February 1, 1945, to the date of enactment of the Housing and Rent Act of 1948, both dates inclusive, were not rented (other than to members of the immediate family of the landlord) as housing accommodations; * * *

SEC. 204. (a) The Housing Expediter shall administer the powers, functions, and duties under this title; and for the purpose of exercising such powers, functions, and duties, and the powers, functions, and duties granted to or imposed upon the Housing Expediter by title I of this Act, the Office of Housing Expediter is hereby extended until the close of March 31, 1948.

(b) (1) Subject to the provisions of paragraphs (2) and (3) of this subsection, during the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person

shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: *Provided, however,* That the Housing Expediter shall, by regulation or order, make such individual and general adjustments in such maximum rents in any defense-rental area or any portion thereof, or with respect to any housing accommodations or any class of housing accommodations within any such area or any portion thereof, as may be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title. In the making of adjustments to remove hardships due weight shall be given to the question as to whether or not the landlord is suffering a loss in the operation of the housing accommodations.

Woods v. Halverson, D. C. Minn., 4th Div.

MEMORANDUM

The primary question before the Court is whether apartments 1, 5, 7, 8, and 9 were housing accommodations as that term is used in Section 202 (c) (3) (B) of the Act, which exempts any housing accommodations from the Act which were not rented as such for any successive 24 month period from February 1, 1945 to the date of the enactment of the Housing and Rent Act of 1948.

The premises in question consist of a three-story house in a residential area of this city. During the 24 month period in question, the first floor of the building was being used as a school, and the second and third floors, consisting of dormitory rooms, were rented to the students, faculty and employees of the school. It is recognized that, during this period, the

school was operated for profit, and during the school year those who occupied the premises paid the required consideration to the school as rent for such accommodations. The rooms thus occupied on the second and third floors were physically segregated from the portion of the building on the first floor, where the classes of the school were conducted. During the time these premises were occupied by the school, they were exempted from the housing regulations by Section 1 (b) (3), Rent Regulation for Hotels and Rooming Houses, because the rooms were used in connection with an educational institution. It appears that the predominant part of the space in the building during the time a school was conducted therein was used for housing students, faculty, etc. It seems clear that, upon the school's discontinuing the use of the premises, this house became subject to rent control if it can be said that the second and third floors were rented as housing accommodations during the 24-month period.

Upon consideration of the showing made herein, it seems evident that these rooms were rented as housing accommodations during the period in question. The second and third floors were not occupied for commercial purposes and had no other use except to provide housing accommodations for the students, faculty, and employees of the school. Were it not for the exemption granted to the school, these premises would have been under rent control during this period. The fact that the availability of the housing accommodations was limited to students, faculty, and employees of the school does not detract from their status as housing accommodations. No good reason is suggested why a sensible and practicable interpretation should not be accorded to Section 202 (c) (3) (B) of the Act in determining whether the present housing accommoda-

tions are subject to the Act. There is no commercial venture which is now being conducted in these premises other than the furnishing of housing accommodations. From every practical consideration, the premises were rented as housing accommodations during the period in question, and the school being conducted on the first floor, although related to the use of the second and third floors, did not change the character of the use of the housing accommodations therein. If a school had been conducted on the first floor and the second and third floors occupied by tenants having no relation to the school, one would not question a finding that the upper floors were rented as housing accommodations within the meaning of the Act. The relationship of the tenants to the school does not change the kind of use for which the space was utilized.

Some point is made of the fact that apartments 7, 8, and 9 were not subject to the Act because they were created by conversion and not completed until after February 1, 1947. While there is competent evidence that they were fully completed prior to that date, the benefit of any doubt may be given to the defendant. She relies on Section 202 (c) (3) (A), which provides that housing accommodations are decontrolled where "the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947." Apartments 7, 8, and 9 were formerly a large room. This room was converted into three apartments and the conversion took place before February 1947. There may be some question as indicated above as to whether or not there were a few items unfinished on February 1, 1947, but the conversion as such had been consummated before that date; in fact, students of the school were occupying these

converted rooms prior to February 1st. Moreover, it would seem that the term "completed" as used in Section 202 (c) (3) (a) is used in connection with new construction, not conversion.

Let this memorandum be made a part of the foregoing Findings of Fact, Conclusions of Law and Order for Judgment.

GUNNAR H. NORDBYE,
Judge.

In the District Court of the United States for the Northern District of Ohio, Eastern Division

HAZEL L. SMITH, PLAINTIFF

vs.

KARL DULDNER, CLEVELAND AREA RENT DIRECTOR, DEFENDANT

Civil No. 25308

MEMORANDUM ON DEFENDANT'S MOTION TO DISSOLVE RESTRAINING ORDER AND TO DISMISS.

JONES, J.: On December 3, 1947, this Court issued a temporary order enjoining enforcement of an order of the Area Rent Director reducing the rents of certain housing accommodations operated by plaintiff. Plaintiff sought a permanent injunction against the enforcement of the rent reduction order on the grounds that (1) the Housing and Rent Act of 1947, pursuant to which the rent order was issued, was unconstitutional and invalid, and (2) the procedure followed by defendant prior to the issuance of the rent order, and the order itself, constituted violations of due process of law. Plaintiff further alleged that she had no adequate remedy at law against the conse-

quences of the allegedly invalid rent order and would suffer irreparable injury by reason of its issuance.

The matter now for consideration is defendant's motion to dissolve the temporary restraining order and to dismiss the complaint.

Briefly, the facts, as alleged in the complaint are as follows:

Plaintiff operates a rooming house containing approximately twenty rental units. On November 3, 1947, plaintiff received a notice from the defendant Area Rent Director to the effect that he proposed to reduce the maximum rents for plaintiff's rental units. Plaintiff duly filed objections to the proposed reduction with the defendant. Notwithstanding the objections, defendant issued an order, dated and purporting to become effective on November 24, 1947, reducing the maximum rents for plaintiff's rental units in varying amounts ranging from 30 to 60 percent of the maximum rents theretofore in effect. The petition for an order enjoining enforcement of the order issued by defendant was subsequently filed in this court.

On November 20, 1947, this Court held the Housing and Rent Act of 1947 to be unconstitutional in *Woods* v. *The Cloyd Miller Company,* 74 F. Supp. 546. It was upon the basis of its decision in the *Miller* case that this Court overruled defendant's first motion to dismiss and issued the temporary restraining order. The fact that plaintiff had not alleged that she had exhausted her administrative remedy was immaterial inasmuch as the law upon which the procedure was based had been held to be invalid. The Supreme Court subsequently reversed this Court in the *Miller* case, 68 S. Ct. 421, holding the Housing and Rent Act of 1947 to be constitutional. Thus, one of the grounds alleged in support of plaintiff's petition for

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an injunction became untenable and the plaintiff became precluded from asserting the other ground, i. e., the illegality of the procedure followed by the Rent Director in issuing his order, since she had not alleged that she had exhausted her administrative remedies.

A proceeding in equity for an injunction cannot be maintained where the party seeking the injunction has an adequate remedy at law. Rent Procedural Regulation No. 1 issued by the Housing Expediter, a copy of which is attached to defendant's brief, provides for review and appeal of the orders of Area Rent Directors and therefore offers plaintiff a remedy at law which must, at this stage, be presumed to be adequate.

Although plaintiff contends that, on a motion to dismiss, all of the allegations of her complaint must be accepted as true; but Rule 12 (b), Rules of Civil Procedure, provides that on a motion to dismiss for failure to state a claim upon which relief may be granted, wherein matters outside of the pleadings are presented, "the motion shall be treated as one for summary judgment * * *." This provision authorizes the Court to consider and decide issues of law where there appears to be no dispute as to the facts.

The temporary restraining order herein will be dissolved and the case dismissed on the ground that plaintiff has not stated a claim upon which relief in equity may be granted in that she has an adequate remedy at law.

Since Procedural Regulation No. 1 limits the number of days following the issuance of an order within which an application for review or an appeal may be filed it is ordered that the time from December 3, 1947, to and including the date of this dismissal and vaca-

tion not be included in calculating the number of days within which plaintiff may apply for review or appeal of the Rent Director's order of November 24, 1947.

(S) Jones, *United States District Judge.*

September 23, 1948.

In the District Court of the United States for the Eastern District of Pennsylvania

Civil Action No. 8078

Whitehall, Inc.

v.

Joseph T. Turchi, Rent Director, Philadelphia Defense Rental Area

Sur Motion to Dismiss the Complaint

March 24, 1948

Before Kirkpatrick, J.

The plaintiff corporation is the owner of a building referred to in the complaint as "Whitehall Apartment Hotel." It applied to the defendant, the Rent Director of the Philadelphia Defense Rental Area, for decontrol and the application was denied, the reason given being that "On June 30, 1947, none of the units in the establishment received all of the five services specified in the Housing and Rent Act of 1947."

In the present action the plaintiff asserts that the order of the defendant is invalid and asks the Court for injunctive relief against its enforcement and for a declaration that it is invalid and unenforceable. The defendant has moved to dismiss the complaint

on the grounds that the Housing Expediter, who cannot be served with process in this District, is an indispensable party, and also because it fails to state a claim upon which relief can be granted.

The constitutionality of the Housing and Rent Act of 1947 can no longer be doubted in view of the decision of the Supreme Court in *Tighe E. Woods* v. *The Cloyd W. Miller Co.,* decided February 16, 1948.

The pertinent portion of the Act provides, Sec. 202, "(c) the term 'controlled housing accommodations' means housing accommodations in any defense-rental area, except that it does not include—(1) those housing accommodations, in any establishment which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service * * *."

The Regulation of the Housing Expediter thereunder provides, Sec. 1, "(b) Housing to which this regulation does not apply * * * (7) (i) Housing accommodations in a hotel * * * which are occupied by persons who are provided customary services including maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy services * * *."

The plaintiff's attack upon the defendant's order proceeds along two distinct lines. The first is that the Regulation (assuming its validity) does not authorize it. The order was expressly based on what amounts to a finding that none of the units in the plaintiff's building *received* all the services enum-

erated in the Act.* The argument is that the word "provided" which appears in both the Act of Congress and the Regulation means merely that the services enumerated must be made available to the tenant, that readiness to serve (regardless of whether an additional charge is made) is the test, and that the fact that the tenants of its building did not receive all the services is immaterial inasmuch as there is nothing to show that they might not have had them all. Hence, says the plaintiff, the defendant acted outside the scope of his authority under both the statute and the Regulation and illegally.

If this were the sole basis of the plaintiff's case, the complaint would have to be dismissed because the plaintiff has not availed itself of the administrative remedy provided by the Regulations. *Yakus* v. *United States,* 321 U. S. 414.

The second line of attack is directed at the position taken by the local Rent Director, as disclosed by his order, that, in order to entitle the building to decontrol, *all* of the five services must be present in the case of each tenant. In so ruling, the Rent Director acted in accordance with and, in fact, as required by the Regulation. The plaintiff, however, contends that the Regulation illegally narrows the statutory definition of properties exempted from control. The Act said "customary hotel services *such as* * * *", naming five. The Regulation says "customary hotel services *including* * * *", the five. If the word "including" means that the five named are irreducible minimum, the Rent Director would be compelled by the Regulation to refuse decontrol in any case in which less than five were furnished. Thus, in this branch of the case, the defendant's order stands or falls with the Regula-

tion. If the plaintiff's argument on this point be accepted, then the decree of this Court would necessarily have to declare the Regulation invalid and illegal, and that, in substance, is what the plaintiff asks the Court to do.

There is no doubt that if the Regulation is held invalid and the ruling sustained by the appellate courts, the administration of the Act throughout the entire country will be affected and hence it cannot be said that the judgment awarded would not "interfere with the public administration." *Land* v. *Dollar,* 330 U. S. 731, 738. As a matter of fact, in that event the Regulation would have to be rescinded or changed. Otherwise, the Housing Expediter would be in the position of directing and requiring his subordinates, by a general regulation, to act contrary to the law. Therefore, "the decree granting the relief sought will" not only interfere with the public administration but will "require him (the defendant's superior) to take action." *Williams* v. *Fanning,* U. S. Supreme Court, decided December 8, 1947. Although such a decree would not in terms order him to do so, the matter is one of substance, and if the ultimate result of the decree would be to compel action by the superior, the superior is an indispensable party.

One of the cases referred to by the Supreme Court as evolving the principle upon which it rests its decision in *Williams* v. *Fanning, supra,* was *Gnerich* v. *Rutter,* 265 U. S. 388, and what was said in the opinion in that case can be paraphrased to fit the present case, "The act and regulations make it plain that the (local Rent Directors) are mere agents and subordinates of the (Housing Expediter). They act under his direction and perform such acts only as

he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been made a party defendant—the principal one—and given opportunity to defend his direction and regulations."

The motion to dismiss is therefore granted.

U. S. GOVERNMENT PRINTING OFFICE: 1949